RECENT PHILOSOPHICAL-LEGAL LITERATURE IN FRENCH, GERMAN AND ITALIAN (1912–1914).

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THE recent death of Wilhelm Schuppe emphasizes the passing away of the older generation of philosophical teachers who, on the basis of their own philosophical systems, could make notable contributions to the field of jurisprudence.[1] But while professional philosophers have been withdrawing from this field, jurists, like other intellectual workers, have been driven more and more by the exigencies of their own work to a philosophical consideration of their own fundamental problems. Besides the general breakdown of the ideaphobia which was so fashionable in the latter part of the nineteenth century, special circumstances have brought issues involving the fundamental principles of jurisprudence to the foreground. The adoption of the German Civil Code which throws upon jurists the task of determining what is "good faith" and "morals," the adoption of the Swiss Civil Code with its explicit recognition of the judges' power of supplementary legislation, and the rise in France and other countries of social legislation[2] involving new forms of responsibility and consequent new methods of interpretation,[3] have all led to the breakdown of the classical theory according to which the law springs complete and fully armed from the brow of a somewhat mythical being called the will of the sovereign. German Historicism as well as French and

[1] Pagel, *Beiträge zur philos. Rechtslehre* (1914), contains a disciple's account of the significance of Schuppe's work in this field.

[2] *Oeuvre sociale de la Troisième Republique*, par MM. Astier, Buisson, etc., *avec preface de M. Deschanel* (1912).

[3] Thery, *Les caractères généraux de la réglementation jurisprudentielle du contrat de travail en droit français* (1913). See esp. pp. 234–236.

English Positivism had all kept the eighteenth century faculty psychology with its air-tight division of the mind into reason and will, and consequent sharp *a priori* distinction between the functions of the legislator and the judge. As there are many demands of practical life which call for just such a sharp distinction between the function of the legislature and that of the courts, the classical theory managed until recently to hold its sway despite occasional mutterings of intellectual discontent.

The general intellectual and practical circumstances referred to above have, however, led to an organized revolt against the traditional view. This may be dated from Geny's *Méthode d'interprétation et sources en droit privé positif* (1899). With massive learning and an overwhelming wealth of illustrative material, Geny pointed out that the legislator cannot foresee all and foreordain everything, and that the interpreter of the law must, therefore, engage in a free scientific inquiry into the social principles applicable to given cases, if the law is to be developed along lines satisfying the needs of modern life. So long as the duty of the judge was conceived as that of a faithful but passive mouthpiece of a pre-existing law, questions of social policy were no part of legal science. With the recognition, however, of the law-creating function of judges and jurists, questions as to the end or the policy of the law have become unavoidable. This has led to a reconsideration of the views as to the relation of law to ethics, logic, and social science, and has thus raised in significant form, philosophical questions as to legal methodology. Towards the latter part of the nineteenth century, the view generally prevailed—witness the works of Windscheid and Laurent—that the main outlines of legal doctrine had received a definitive form and that only various details remained to be determined.[4] Our age, however, delights to question fun-

[4] See the confident assertion by the authors of the *Supplement au repertoire de Dalloz* (1887), Vol. I, pp. vii–ix, that legal doctrine had achieved "a complete development." A striking parallel may be found in Clark Maxwell's inaugural address at the opening of the Cavendish laboratory in which he

damentals in all realms. But it is not skeptical. It has found a simple way of establishing new fundamentals by means of the principle of historical evolution. If we can show that any legal or ethical principle is the result of or expresses a tendency of evolution, the principle of universal progress will at once make it as canonical as the older ways of Providence.

This procedure is well-illustrated in Duguit's *Les transformations générales du droit privé* (1912) in which, under cover of a survey of the transformations of private civil law since the adoption of the Napoleonic Code, Professor Duguit attacks the whole classical theory of law, root and branch. Professor Duguit regards the notion of subjective rights as too metaphysical for any positive legal science, and endeavors to show that legal progress is away from a metaphysical, subjective, and individualistic conception, as embodied in the Declaration of the Rights of Man, and the Code Napoleon, to a positive, objective, and social system of rules. Thus the rapid growth of our corporation law shows that no actual will is necessary in order to have subjects of legal rights—unless we take refuge in the mystic doctrine that business corporations have wills or souls of their own. Thus also the notion of responsibility as based on *fault* (twin sister of theologic 'sin') is giving way to the conception of responsibility based on the objective determination of the risk involved in a transaction or undertaking. The notion of property as the absolute right of individual dominion, he shows, has given place to the notion of property as a social arrangement for the conservation of wealth and therefore essentially subject to constant social regulation or restriction. With the abandonment of the notion of subjective rights, there goes, of course, the whole classical theory of juristic acts, transactions, etc.

seems to think that the great discoveries of physics had already been made and that all that was left to laboratories was to perfect the determination of physical units. See Maxwell's Collected Papers or, History of Cavendish Laboratory (1911).

Hence Positivists as well as Catholics have rushed to the defence of the doctrine of subjective rights.[5]

The most effective answer, however, to Duguit's book comes from legal history itself which, like nature, does not run for the convenience of our generalization but has an irritating way of showing progress in opposite directions. Thus property has, in the period covered by M. Duguit, not only become more subject to social regulation but also (as in the case of copyright, or in the abolition of communal property) become more individualistic.[6] This is well illustrated in an excellent survey of the actual legal changes of the nineteenth century by Charmont, *Les transformations du droit civil* (1912). It treats more in detail the changes in family law, the legal position of women and children, as well as the increasing restrictions on private property; and in the last three chapters gives one of the best discussions we have of the theory of risk, fault, and responsibility, in the light of modern industrial conditions and legislation.

Modern industrial conditions have not only scandalized classical jurisprudence by developing the notion of an objective responsibility independent of all personal fault but even more so by the new notion of *abuse of rights*. As a legal right has always been held to define the limits within which one may legally act, it seems that an abuse within one's rights is a logical impossibility. Legal abuse can only begin, it would seem, where rights end. But the exigencies of life sometimes overcome even the difficulties of juristic logic, and French courts have, in passing on strikes, lockouts, and boycotts, been forced more and more to resort to this notion of abuse of rights. Here, as elsewhere, the seeming defiance of logic turns out on closer examination to be the successful assertion of

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[5] Archambault in *Annales Philos. Chrétienne*, 1912, pp. 225–257; Richard in *Revue Philosophique*, Mars 1912, pp. 225, 246; A. Levi, *Contributi ad una teoria filosofica dell' ordine juridico*, pp. 260–283.

[6] Cf. Plastora, *Nouvelles tendances dans le droit—Libertés et patrimonies* in *Revue trimestrielle de droit civil*, 1912 m. 4.

practical needs over against an inadequate theory. The classical jurisprudence regarded the law as a body of definite *existing* principles which courts were merely to apply. Now, however, transformism has invaded also the realm of legal thought, and it is beginning to be recognized that as new situations are coming up, courts must in fact make law, or at least modify old rules by stretching or restricting them. The law gives the employer the general right to engage or discharge anyone he pleases, and to the workman the corresponding right of entering or leaving the employment. But, does the employers' right include the right to discharge men because they belong to a union, and does the workmen's right to leave include the right to do so in order to compel a fellow employee to enter the union? Logically it seems we must answer in the affirmative. But courts feel that social order or the interest of the public demands a more qualified answer. And this is accomplished by the general principle that rights are bestowed for social purposes, and therefore any exercise of one's rights which leads to anti-social results, is to be regarded as abusive. The doctrine is thus a general principle whereby the social end of a right is made to determine its varying limits in different cases. It thus seems a clear instance of legal pragmatism.

The whole doctrine is critically examined in Roussel's *L'abus du droit* (1914). Roussel makes some telling points against that soft-heartedness which would banish all strife from this world, and in his insistence on the value of clear thinking. In the main, however, his objections rest on the assumption that law, as distinct from morality, must be absolutely definite and, therefore, judges must not let their sense of humanity blur the clear outlines of the rights fixed by the law. But this assumption that the whole law is a logically closed system, which no longer has to draw its nourishment from the breasts of its mother Justice, is precisely what the newer jurists are disputing. In harmony with the anti-intellectualism now prevalent in popular philosophy, and characteristic of other forms of

modernism, they no longer regard judge and jurists as automata for unfolding the logical content of fixed legal concepts but as the living organs of society for recreating the law in harmony with daily needs—the theory of the division of power to the contrary notwithstanding.

It is natural for reformers or protestants to divide themselves into sects. Some emphasize the opposition to logic and juridical construction, in contrast to common sense humane sentiments, and the teachings of sociology (Fuchs, Wüstendorfer[8]); while others insist simply on more adequate concepts to enable the law to *develop* (Stampe).[9] Some insist that the judge is to legislate only *præter legem*, to fill up the blanks in the legal system (Danz).[10] But others claim that a unitary method requires judicial legislation even *contra legem* (Wüstendorfer[11]). Some contend for the claims of the living law of to-day and its needs, determined by social science, in contrast to the will of the legislator determined by history (Kohler,[12] Ehrlich,[13] Kantorowicz[14]); while others insist on social interests in harmony with the

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[7] Fuchs E., Juristischer Kulturkampf, 1912.

[8] Wüstendorfer *Die deutsche Rechtsprechung am Wendepunkt. Archiv für civil Praxis*, 1913, Vol. 110. Hostile to logical 'construction' in law is also Müller-Erzbach *Die Relativität der Rechtsbegriffe* in *Jherings Jahrbüchee* (1912), Vol. 61. In his long review, however, of Jung's book, in the *Zeitschrift für d. gesammte Handelsrechts* (1913), Vol. 73, Müller-Erzbach seems to have become afraid of the emphasis on sensibility, as opposed to logic, in law.

[9] Stampe, *Grundriss der Wertbewegungslehre*, 1912, and *Aus einem Freirechtslehrbuch*, in *Archiv für d. civil Praxis*, Vols. 107, 108, and 110. Stampe seems to have done the most work in the direction of actually applying the principles of the *Freirechtschule* to the concrete subject matter of the law.

[10] Danz, *Einführung in die Rechtssprechung*, 1912, and *Richterrecht*, 1912. See also his *Fortschritte durch Erkenntis der Lücken im Gesetz*, in the *Deutsche Juristenzeitung*, 1914, pp. 7 ff.

[11] *Op. cit.* It is curious that Wüstendorfer, who argues that logic should occupy a subordinate position in the interpretation of laws, should attach such great importance to a unitary method in a subject that might well admit of many methods so far as practical interests are concerned.

[12] Kohler, *Recht und Persönlichkeit* in der *Kultur der Gegenwart*, 1914, esp. pp. 24, and 220 ff.

[13] Ehrlich, *Grundlegung der Soziologie des Rechts* (1913).

[14] Kantorowicz, *Was ist uns Savigny* in *Recht und Wirtschaft*, 1912.

historically ascertained ends of the legislator (Heck[15]). Some personify the culture or ideals of the age so that they suppose definite juridical deductions can be made from them (Berolzheimer[16] and Kohler[17]); while others insist on a more inductive procedure based on a trained sense of what is required in individual cases (Jung[18]). In their common insistence, however, that the legal system is not eternally self-sufficient but must always continue, through judge and jurist, to draw on social science, ethical sentiments, or culture of the age, these writers defy the historicist and positivist condemnation of all rational or non-positive law. Hence they are accused by their opponents (Bartolemei,[19] Gareis[20]) of undermining the value of the law by opening the door to arbitrary decisions which would be subversive of all the social interests that depend on the certainty and impartiality of the law.

The one who might fitly be called either the stormy petrel or the enfant terrible of this *Freirechtsschule*, Kantorowicz, has not hesitated to ascend to the source of the modern historical school, and lay hands on Savigny himself, showing the limitations of the latter's conception of

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[15] Heck, *Gesetzesauslegung und Interessenjurisprudenz* (1914), the most extensive and systematic study we yet have of the process of legal interpretation. There is some impropriety in including Heck among the Freirechtler, because of his rather narrow adherence to the imperative theory and his exaggeration of the extent to which the will of the legislator is determinate. But the logic of the insistence on social interests forces him to make significant concessions. Thus the judge "should protect those interests which exist at the time of the application. Only the living have rights. But each statute already belongs at the time of its application to the past" (p. 14). He also admits that Fuchs has rendered great service to jurisprudence by his warmhearted appeals, and Kohler by emphasizing the creative function of jurisprudence (pp. 215, 277).

[16] Berolzheimer, *Moral und Gesellschaft des 20 Jahrhunderts* (1914), already noticed in this JOURNAL, Vol. XXV, p. 121. Cf. also Berolzheimer, *Die Gefahren eines Gefühlsjurisprudenz* (1911).

[17] Kohler, *op. cit.*

[18] Jung, *Problem des natürlichen Rechts* (1912).

[19] Bartolemei, *La ragione della jurisprudenza pura* (1912).

[20] Gareis, *Moderne Bewegungen in der Wissenshaft des deut. Privatrechts—Rektorsrede* (1912).

jurisprudence and the inadequacy of his criticism of the old natural law (*Was ist uns Savigny*, 1912).

This has brought forth a carefully elaborated apologia for Savigny by Manigk, *Savigny und der Modernismus im Recht* (1914), in which the attempt is made to show that it is these modernists who have the wrong conception of jurisprudence, and that when they are right, they have already been anticipated by Savigny himself. As is usual in such work, texts are frequently tortured to make them confess the desired meaning. Nevertheless there is here enough genuine criticism of the modernists' attack on the historical school to warn us that all sharp contrasts are but pedagogic devices to make our intention clear. They may express a tendency but cannot pretend to strict historical accuracy in point of fact. Manigk's book leaves one with a very sober sense of the complexity of legal method and the vanity of monistic attempts to claim everything for a single method or panacea, no matter how new.

When law is viewed in the process of being made, rather than as a completed, sanctioned system, the state or sovereign can no longer be regarded as the exclusive source of all law. This is vigorously brought out in Jung's *Problem des natürlichen Rechts* and Ehrlich's *Grundlegung der Soziologie des Rechts*. Jung, who in previous books had attacked the notion of positive law as a closed logical system, here takes the growing character of the law in the process of interpretation for granted. What, however, is the method according to which this is done? In spite of a too liberal reliance on the principle of social eudæmonism based on popular Darwinian evolutionism, Jung, more than any other modern jurist, emphasizes the primacy of the individual case. Law grows out of the effort of man to protect himself against wrong, which, following Schopenhauer, Jung regards as the primary positive idea of the law. Jung carefully examines the relation between the feeling of right and wrong in a given case and the principles which jurists assert as the justification or basis of

the decision, and thus gives us something of actual juristic logic (§ 7). But his acceptance of the popular inadequate conception of induction (which makes principles somewhat gratuitous afterthoughts) and a pseudo-scientific belief that the determination of what is, is superior to the determination of what ought to be, prevent the successful carrying out of this admirable attempt to give us a theory of natural law or justice as an actual source of the law.

Ehrlich's primary interest is in what he calls living law, the law which is actually operative and controlling in the affairs of men. From this point of view he is compelled to join the protest against the exaggerated importance hitherto attributed to the state in the field of law. The state, according to him, is a late comer in this field and does not even to-day exhaust the life of the law. Most people obey the law because of custom and not because of direct coercion by the state. The main work of the state in the realm of law is rather educational, to see that the citizens are brought up in habits of obedience. The state and its juristic organs are responsible only for adjective law, *i e.*, or the law that regulates the remedies which protect the living law. The norms for deciding cases become operative only in litigated disputes which, from the social point of view, represent the pathology of the law. The family that goes to court is pretty much broken up, as a family. To the jurist, litigation is the primary matter, but in the mind of the community, the concrete legal institution. Like Kantorowicz, Ehrlich sharply opposes the historical school, which, as in Savigny's treatise on Possession, emphasizes the past at the expense of the present. History cannot be the basis of law any more than paleontology can be the basis of physiology. Our knowledge of the past of the law is more dependent on our knowledge of the present than the latter is on the former. The vital part of the law then must be sought not in the past, but in present day arrangements, not in a mythical folk mind but in the actual social arrangements of to-day. Hence a new program of legal studies. The actual system

of property holding of Austrian peasants will not be found in the Code, which is based on Roman law and not on actual practice. The actual law must be sought in archives, notarial records, acts of incorporation, notices of the formation and dissolution of partnerships, etc.

Ehrlich's book suffers from the fact that it draws no clear account of what he means by law and how he distinguishes it from customs and morals (cf. p. 136). The lines between law and morals, he tells us, are shifting. This, however, is all the more reason for demanding clear ideas. Thus it may be urged that what Ehrlich calls living law, is simply custom, which, as such, is not law at all, though it may become so under certain conditions. Moreover, his assumption that state law merely regulates procedure, and that the latter is subsequent to the substantive law, is not easily borne out by historic fact.

An energetic though laborious protest against the overemphasis of custom or social practice as a source of law, is found in Oertmann's *Rechtsordnung und Verkehrsitte* (1914). In opposing the claims of social science in the interpretation of law, he asserts that all law is either the work of the state, or becomes law because recognized by the state; and he even goes far to deny the old claim of the historical school that law does arise in custom. Not social practice, but the continual application of a rule by the courts, makes it law. In thus emphasizing the law-making function of the courts he comes very near the position of the *Freirechtler*, that judges must put the breath of life into the dead sentences of the statute book.

While those engaged in civil law have been thus engaged in trying to make civil law more flexible, those engaged in public law (which is popularly supposed to be an indeterminate branch of politics) have been trying to elaborate a rigorous logical technique. An unusually able book representing the latter movement—showing familiarity with Kant and Sigwart as well as with the police laws of the various German communities—is Walter Jellinek's *Gesetz, Gesetzesanwendung und Zweckmässigkeitserwägung* (1913).

Starting from the fact that courts have to pass on the legality of administrative acts but have no authority to inquire into the appropriateness or necessity of such acts, Jellinek tries to determine the meaning and limits of this administrative freedom or discretion. In the course of this inquiry he examines carefully the logical morphology of the law in the process of its application. He has some pertinent remarks on the imperative theory of the law, though like his distinguished father he holds that all law is as such of state origin. While he holds tenaciously to the view that the interpreter of the law is engaged in a process of determining an historically objective fact, a meaning actually intended by the legislator, his treatment of what he calls the undetermined concept is very suggestive in showing the large share of freedom in the process of interpreting the law.

A similar attempt for French law, though more narrowly legal, is Michoud's *Étude sur le pouvoir discrétionnaire de l'administration* (1913).

More revolutionary in its attitude toward established ideas in public law is Duguit's *Transformations du droit public* (1913). Attacking rigorously the notion of sovereignty as appropriate only to Byzantine and mediæval conditions, M. Duguit suggests the notion of public service as the fitter basis for public law, the responsibility of public officials to be determined accordingly. Laws are binding not because they are willed by the state, but because they are the conditions under which human beings can live in society. Thus on the basis of extreme positivism M. Duguit comes to a position very near that of the old natural law with its insistence on the judge's veto over unconstitutional legislation and the strict responsibility of public officials.

An American lawyer reading for the first time Stammler's introductory article to the *Zeitschrift für Rechtsphilosophie in Lehre und Praxis*, or the concluding article in the collection *Systematische Rechtswissenschaft* (*Kultur der Gegenwart*), is sure to suppose that he is in the presence of the

traditional German philosopher trying to deduce everything from *a priori* principles but remaining in the cloudy region of abstruse abstractions.[21] Yet Stammler is primarily a jurist who, taking the distinction between just and unjust law seriously, and finding no light on the essence of that distinction in the writings of the historical school, has been led to an adaptation of the Kantian philosophy as supplying the needed criterion. Starting with the Kantian distinction between the changing and conditioned *content* and the unconditioned unchanging *form* of the law, Stammler tries to determine on the basis of the Kantian epistemology the eternal form of all just law. He naturally rejects as empirical all ends such as material comforts, national integrity, or the cultivation of the arts and science, and sets up the pure form of a community of free willing men as the absolute end valid for all times and places. On the basis of this absolute end Stammler and his followers try to determine the limits of freedom of contract, the proper interpretation of the German Civil Code provisions for good faith (s. 242) and good morals (s. 826) and the proper application of (s. 825) the Code of Civil Procedure in the case of goods sold at auction.

In the high and rarefied air in which the argument starts it is hard to see how Stammler can effect a transition from such formal concepts as the transcendental unity of apperception to any actual content of the law. No more than Kant does he succeed in showing how a pure logical form can, apart from material premises, determine the actual content of a law; nor can he disprove the fact that all sorts of opposing claims in controverted questions are equally compatible with the essentially vague ideal of a community of free wills. Stammler, like other Neo-Kantians, seems to

[21] For an examination of Stammler's philosophy see Breuer, *Der Rechtsbegriff auf Grundlage der Stammlerischen Sozialphilosophie* (No. 27 of the Supplements to the *Kantstudien*), 1912, and Wielckowski, *Die Neukantianer in der Rechtsphilosophie* (1914). See also Fränkel *Die kritische Rechtsphilosophie bei Fries und bei Stammler* (1912). The present leader of the Fries school, Nelson, has given us a short but weighty pamphlet in this field, *Die Theorie des wahren Interesses und ihre rechtliche und politische Bedeutung* (1913).

me to confuse the logical form of consistency, indispensable to all rational effort in law and ethics, with the ultimate end or ideal which must necessarily involve a matter of choice. Just as reason cannot prove all propositions, but presupposes certain premises as accepted, so reason cannot determine the ultimate end but can only show the fitness of means to ends.

The rich content of this *Zeitschrift* as well as Stammler's *Theorie der Rechtswissenschaft* (1911) serve to show the justice of Simmel's remark that in works of this kind it is not impossible for solid superstructures to rest on very flimsy foundations. But perhaps it would be more just to say that Stammler's legal results form a solid building resting on earthly experience, but to its indweller it seems supported by logical threads from the epistemologic heaven.

A very clear exposition of Stammler's point of view (though not avowedly designed as such) is Djuvara's *Le fondement du phenomène juridique* (1913). The elaborate technical epistemologic machinery is lost in the passage across the Rhine and the angular logical rigidity softened in the French garb. But the two fundamental characteristics of Stammler's viewpoint, the emphasis on the categories of pure reason, as the source of the specifically juristic element in social facts, and the attempt to derive all rights and obligations from the free meeting of minds, emerge very clearly. On an independent basis, but leading to the same result is Del Vecchio's *Il concetto del diritto* (1912), now translated into English as Part II of his *Formal Basis of Law*. Neither Djuvara nor Del Vecchio, however, seem to take notice of the insuperable difficulties which the facts of the legal order such as employers' liability, or the laws of inheritance, offer to the theory which makes all obligation rest on consent. If the state needs my land, justice may be said to demand that I be given the fair market price. But does that mean that I necessarily do consent to part with the house, the treas-

ured emotional associations of which nothing else in the world can replace?

A similar result, from a professed Neo-Hegelian starting point, is found in Kohler's general survey of the legal situation, *Recht und Persönlichkeit in der Kultur der Gegenwart* (1914), and in his more technical book on the law of competition, *Der unlautere Wettbewerb* (1914). Both attempt to derive all legal obligations from the rights of personality. Kohler was one of the pioneers of the sociologic interpretation of law, but his attempt to derive the rights of competing business corporations from the rights of personality leads to the weirdest kind of *Begriffsjurisprudenz*. Does personality for legal purposes mean anything more than a point which is the focus of rights and obligations? If we once see that rights and obligations are the primary objects of legal science and that associations represent groups of rights and obligations in some respects like and in some respects different from those possessed by single individuals in similar legal situations, we shall be spared a great deal of absurd metaphysics. In no field does the baneful and fruitless word *reality* cause so much confusion as in the field of jurisprudence and more especially in the question as to the reality of legal personality.

Kohler's *Recht und Persönlichkeit* was written before the war and ended with a very inspiring survey of the position of international law; but after the war broke out he saw fit to recant his noble vision. It is a great pity that a scholar of his standing should have descended from the heights where the search for impartial and international truth reigns supreme, into the arena where rage the temporary conflicts of hatred and economic interests. In his recantation Kohler restricts humanity to Germany, Turkey and Italy (this was before May 1915): and his intemperate denunciation of England will certainly not add to his reputation for scientific sobriety.

One of the few avowedly philosophical attempts of the *Freirechtsschule* is Radbruch's *Rechtsphilosophie*, and for a book of this title it sticks rather close to juridical matters.

Radbruch does not attempt, like Stammler or Kohler, to storm the empyrean; but gives us a careful analysis of what is meant by the validity of law, and a fresh account of the relation of law to politics. Radbruch is not taken in by the over-hasty monism which refuses to take note of the distinction between the normative and the existential standpoints. But his reliance on the Windelband-Rickert philosophy leads him to overemphasize the pathos of legal thought which must move in both the theoretical and the practical realm. "Youthful idealism and hunger for reality will always seek to construct bridges leading from jurisprudence to ideals and life; the resignation of manhood will insist on isolation and self sufficiency."

Written along the traditional Hegelian lines of the Italian School are Petrone's *Il diritto nel mondo dell spirito* (1912) and Rensi's *Il fondamento de diritto* (1912). The second volume of Barillari's *Diritto e filosofia* (1912) is a synthesis of Kantian and Hegelian elements to produce a juridical epistemology based on the conception of absolute knowledge. Biavaschi's *La crise attuale della filosofia del diritto* (1913) is written from the religiously orthodox standpoint, but, beyond some suggestive criticisms, does not offer anything new.

As the Italian universities require a separate course on the philosophy of law in the law faculties, books on what the Germans call the general theory of law are called philosophy of law in Italy. This is certainly the case with Miceli's *Principii di filosofia del diritto* (1914), an admirably gotten up volume which, in spite of 900 pages, is of small pocket size and altogether in substance as well as in outer form one of the most satisfactory text-books on the subject. In spite of the title of this book, and of his larger four volume book bearing a similar title, Miceli insists that a philosophy of law is impossible, and what passes as such is a mixture of ethics and of the general theory of the law. But why may not both ethics and the general theory of the law be philosophical? Miceli's objection is based on the traditional conception of phi-

losophy and the gratuitous assumption that reflection on empirical material cannot rise to "high speculative concepts." Somewhat similar in scope to Miceli's book—though the very antithesis in external makeup—is Cosentini's *Filosofia del diritto* (1914) which embodies a great deal of the material of his earlier book, *La Reforme de la législation civile* (1913). Cosentini belongs to the school of liberal Positivism and conceives of the philosophy of law as a handmaid to the sociology of law. Philosophy must not be too critical, but must restrict itself to an examination of the logical and phenomenologic essence of juridical facts and their relation to other social facts. Social ideals, however, he admits, are actual facts of the utmost importance in legislation and in judicial law-making through the filling up of the lacunæ of the law. Hence the philosophy of law must not restrict itself to a study of the law as it is, but must help in its transformation.

Belonging in the main to what might be called the school of idealistic positivism is A. Levi's *Contributi ad una teoria filosofica dell' ordine giuridico* (1914), a development of his earlier book, *La société et l'ordre juridique* (1911). Levi is a devoted follower of the venerable Italian philosopher Ardigo. He insists on the possibility of a philosophy of law that is not merely an historic or ethnographic jurisprudence or the merely general part of legal science. But he rejects all attempts at deontology. He seeks to base his philosophy of law on psychology and gnoseology, a positivistic adaptation of epistemology. He sees an analogy between the reaction of modern jurisprudence against the theory of innate rights prior to the existence of society, and the reaction of soulless psychology to the existence of a substantial self. The problems of the philosophy of law thus include (1) the presuppositions of juridical experience and the criticism of the common consciousness of legal thought, (2) the concept of law and the nature of the juridical order leading to a critique of the technique of laws, and (3) the indications of the tendencies of juridical evolution and the criticism of the historical

consciousness of right. It is thus seen that while the deontologic standpoint is rejected and we are repeatedly warned that we must not give norms to experience, it is nevertheless kept in a powdered form in the treatment of the separate questions.

While jurists dealing with their own subject matter have thus been raising vital philosophic issues from new points of view, their results when they consciously turn to general philosophy do not seem to me to be of much value; for, when they leave their own field they are inclined to accept inadequate traditional principles that were framed without regard to the specific subject matter of the jurist. This seems to me to be well illustrated in the introductory volume of Geny's *Science et technique en droit privé positif* (1914). Geny, indeed, attempts to avoid this difficulty by choosing freely elements from scholastic common sense, Bergsonian intuition, and the psychology and sociology of positivism; but very little of his "*approfondisement*" of legal method moves outside of the traditional and somewhat antiquated logic and psychology embodied in such books as Ribot's Evolution of General Ideas and the ordinary text-book of formal logic. The footnotes, indeed, contain an astonishing number of references to modern classical treatises in the methodology of the natural and social sciences, yet the substance of the book impresses one as nothing more than a collection of the commonplaces of familiar epistemology illustrated with legal material. The fundamental distinction of the book between science and technique (the former dealing with what is given and the latter with what is constructed) is certainly not clearly thought out. (Witness, for example, the reference to technique as "the work of artificial if not arbitrary will," p. 96.) There are, of course, many valuable observations in the book, but these, like the remarks on analogy (157–160), are independent of the main thesis and were, indeed, substantially embodied in Geny's earlier book.

While Geny's philosophic ecclecticism reminds one of Cousin, the elaborate bibliographic footnotes, the formal

longwinded introductions and divisions of the subject, and other ceremonious delay in getting down to the subject matter, and, above all, the naïve faith in epistemology, show the tremendous influence that Germany has been exercising lately on intellectual France. Geny is impressed by the fact that Berolzheimer's five volume treatise on legal philosophy devotes the first volume to epistemology. But is there a single problem in the four subsequent volumes of Berolzheimer's book that is decided by reference to the first? I can see no more connection there than between the saying of grace before meals and the composition of the dishes.

The large volume of M. Fabreguettes, entitled *La logique judiciaire et l'art de juger* (1914), contains some interesting remarks on evidence and other matters, but bears little on juristic logic. Much more of the last topic will be found in an unpretentious contribution to the Wach *Festschrift* (1912) by Wehli, *Beiträge zur Analyse der Urteilsfindung*, Vol. I, pp. 429 ff.

I have restricted this survey to philosophic efforts on the part of professional jurists. I ought to mention, in conclusion, several noteworthy attempts to enlarge philosophic technique to enable it to cope more adequately with legal as well as other material. The philosophy of Husserl, like that of Meinong, with its attempt to free the consideration of the essence or character of things from the question of their existence, seems to me of great promise for jurisprudence in the direction of simplifying needlessly complicated problems like that of legal personality, animus and corpus in possession, etc. Unfortunately, however, the study in Husserl's *Jahrbuch* (1913) devoted to this topic, *Die apriorischen Grundlagen des bürgerlichen Rechts*, by Reinach, is too much dominated by an unclear conception as to what is *a priori*, and the common weakness of those unacquainted with legal history, namely, of regarding certain arrangements as logically necessary when they are merely the results of historical accident.

Another effort to develop a Kantian *Kulturphilosophie*, along lines suggested by Hermann Cohen's *Ethik des reinen Willens*, is Münch's *Erlebnis und Geltung* (supplemental monograph, No. 30, to the *Kantstudien*). Münch tries to show how the regulative function of ideas determines the content of practical judgments and how ethics as a transcendental philosophy of history can enable us to determine which system of value represents concrete reason for the present state of civilization. Münch makes out a very clear case against philosophies of the type of Carlyle, Hegel, or the popular evolutionists who think that everything that triumphs is necessarily in the right. But he has not as yet offered us any satisfactory criterion to enable us to choose which of the historical systems of value are the preferable ones. Indeed he himself seems very close to the Hegelian point of view.

On an entirely independent basis, philosophically and juristically, is Walter Pollak's *Perspective und Symbol in Philosophie und Rechtswissenschaft* (1913). Every science is, as a creative activity and vital effort, historically determined by certain volitions and interests, and in turn modifies these. The question then may be raised not of the absolute correctness of a science but of the extent to which it satisfies the vital demands which brought it forth. In the elaboration of perspectives or points of view, symbols or picturesque expressions appeal to the scientific imagination so as not only to give it satisfaction but also to suggest further research and the discovery of new relations. This is applied in a very suggestive way to the field of law and to the way in which juristic conceptions are determined by laws, customs, and the world-view of the time, but in turn modify all these. Juristic method thus has to use history, sociology and even theology as heuristic principles.

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